BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

SERVANDO MARTINEZ-SORIA	)	
Claimant	)	
	)	
VS.	)	
	)	
R & P CATTLE, LLC	)	
Uninsured Respondent	)	Docket No. **1,038,555**
	)	
AND/OR	)	
	)	
WORKERS COMPENSATION FUND	)	

ORDER

Claimant requests review of the April 14, 2008 preliminary hearing Order Denying Compensation entered by Administrative Law Judge Pamela J. Fuller.

ISSUES

It was undisputed that claimant injured his ankle and knee in an accidental injury while working for respondent. The Administrative Law Judge (ALJ) denied benefits finding that the respondent is engaged in an agricultural pursuit and exempt from the Kansas Workers Compensation Act pursuant to K.S.A. 44-505(a)(1).

The claimant requests review of whether the ALJ erred in finding that respondent was engaged in an agricultural pursuit. Respondent and the Kansas Workers Compensation Fund argue the ALJ's Order should be affirmed.

The sole issue on this appeal is whether the agricultural pursuit exemption applies to the parties.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, this Board Member makes the following findings of fact and conclusions of law:

On November 15, 2007, claimant slipped and fell from a trailer injuring his left knee and right ankle. The accident was reported to respondent and claimant was transported

to a hospital in Cimarron, Kansas. He was then transferred to St. Catherine's Hospital in Garden City, Kansas. On November 20, 2007, Dr. Garcia performed surgery on claimant's knee and ankle. Claimant was taken off work and then released by Dr. Garcia on March 13, 2008, without restrictions.

The respondent business is located on a quarter section of land and consists of raising newborn Holstein calves which are picked up daily from a number of dairies in Southwest Kansas. The operation averages 7,000 head of cattle a month. The calves are each bottle fed with milk replacer as well as grain fed. All the veterinary needs are taken care of and the bull calves are castrated and dehorned. The calves are kept and raised for approximately 120 days and then the heifers are returned to the dairies which retain ownership of the heifers. Typically the dairies sell the bull calves to feedlots. Respondent does not have any ownership interest in the calves. If a calf survives then respondent is paid a daily yardage fee (a set amount per day) for raising the calf. If the calf does not survive or is culled the respondent is not compensated for any of its expenses associated with that calf.

The sole issue for review is whether the ALJ erred in finding that respondent was engaged in an agricultural pursuit at the time of claimant's accident. The controlling statute is K.S.A. 44-505(a)(1) which provides:

> Subject to the provisions of K.S.A. 44-506 and amendments thereto, the workers compensation act shall apply to all employments wherein employers employ employees within this state except that such act shall not apply to:
> (1) Agricultural pursuits and employments incident thereto, other than those employments in which the employer is the state, or any department, agency or authority of the state; . . .

Some would argue the reason the agricultural pursuit exemption remains in the statute is not to burden the small farmers that are located in Kansas with the costs of requiring the farmers to carry workers compensation insurance and the practical administrative difficulties necessarily associated with employers who are covered by the Workers Compensation Act. But the amendments that were made to the Act in 1974 accomplished the exemption of small farmers from the Act by limiting covered employment a yearly payroll less than $10,000, and presently less than $20,000.[1]

The Kansas Court of Appeals adopted a three-part test for determining whether a specific pursuit or business is an agricultural pursuit within the meaning of K.S.A. 44-505(a)(1):

A. The general nature of the employer's business.

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[1] K.S.A. 44-505(a)(2).

B. The traditional meaning of agriculture as the term is commonly understood.

C. Each business will be judged on its own characteristics.[2]

In *Witham*, the claimant was injured while holding a horse while a veterinarian took a blood sample. The trial court found the respondent was not engaged in an agricultural pursuit. The Court of Appeals applied the three-part test, finding first that the general nature of respondent's business was boarding and showing other people's horses. Second, the court concluded that the traditional meaning of agriculture would probably not include boarding and showing other people's horses. Moreover, the ordinary farmer typically did not show and board horses. Finally, the court concluded the respondent was primarily engaged in a commercial enterprise which entailed providing services for other people's horses. The court held that the work being done by claimant at the time of his injury was not an agricultural pursuit and the claimant was covered under the Workers Compensation Act.[3]

In a later case, the Court of Appeals held that when the respondent raises the agricultural pursuit defense the court must follow a two-step analysis. First, the Court must determine whether the employer was engaged in an agricultural pursuit using the three-part test set forth in *Witham*. If the answer is "yes," then the Court must proceed to the second step which is to ascertain if the accident occurred while the employee was engaged in an employment incident to the agricultural pursuit. If the answer is "yes," then the employee is not covered by the Act. If the answer is "no," there is coverage.[4]

In *Frost*, the claimant was injured while hooking up a horse trailer to take it to a livestock area on a farm. Claimant was employed as a construction foreman for a construction company whose primary stockholder was also the owner of the farm where claimant was injured. The court found that it could not be denied that claimant was injured on a farm and was performing work incident to the farming operation at the time of his injury. But the court went on to hold that when the *Witham* test was applied to the facts of the case, claimant was primarily employed by the construction company at the time of his injury and the construction company was not primarily engaged in an agricultural pursuit.

In this case the respondent is essentially a feed lot raising calves so the heifers can be returned to the dairies as replacement cows to ultimately produce milk and the bull calves are sold to feedlots for beef. In essence the calves are raised in preparation for marketing a product, i.e. milk or beef. And raising cattle to market either the milk or beef certainly appears to meet the traditional meaning of the term agriculture as the term is

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[2] *Witham v. Parris*, 11 Kan. App. 2d 303, Syl. ¶ 3, 720 P.2d 1125 (1986).

[3] *Id.* at 307.

[4] *Frost v. Builders Service, Inc.*, 13 Kan. App. 2d 5, 760 P.2d 43 (1988).

commonly understood. Moreover, in *Witham* it was noted that K.S.A. 47-1502 provides that feeding of livestock shall be construed to be an agricultural pursuit. And in zoning cases it has been held that feeding and raising livestock for market is an agricultural pursuit.[5]

This Board member concludes that respondent is engaged in an agricultural pursuit and the accident occurred while the claimant was engaged in an employment incident to the agricultural pursuit. Consequently, the accidental injury is not covered by the Act and the ALJ's Order Denying Compensation is affirmed.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[6] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2007 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.[7]

WHEREFORE, it is the finding of this Board Member that the Order of Administrative Law Judge Pamela J. Fuller dated April 14, 2008, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of June 2008.

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HONORABLE DAVID A. SHUFELT
BOARD MEMBER

c: Randy S. Stalcup, Attorney for Claimant
Wendel W. Wurst, Attorney for Respondent
Kendall R. Cunningham, Attorney for Fund
Pamela J. Fuller, Administrative Law Judge

[5] *Fields v. Anderson Cattle Co.,* 193 Kan. 558, 396 P.2d 276 (1964).

[6] K.S.A. 44-534a.

[7] K.S.A. 2007 Supp. 44-555c(k).